(13)

No. 91-1657

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

CHARLENE LEATHERMAN, *et al.*,
Petitioners,

v.

TARRANT COUNTY NARCOTICS INTELLIGENCE AND COORDINATION UNIT, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF OF THE NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS, NATIONAL LEAGUE OF CITIES, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, COUNCIL OF STATE GOVERNMENTS, NATIONAL GOVERNORS' ASSOCIATION, U.S. CONFERENCE OF MAYORS, AND NATIONAL ASSOCIATION OF COUNTIES AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether a federal district court can require "heightened pleading" when a complaint asserting a section 1983 claim against a municipality alleges a custom or policy of inadequate training under *City of Canton v. Harris*, 489 U.S. 378 (1989).

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INTEREST OF THE *AMICI CURIAE*

Amici, organizations whose members include state, county, and municipal governments and officials throughout the United States, have a compelling interest in legal issues that affect state and local governments. *Amici* believe that the Court's decision in this case will have a substantial impact on the amenability of municipalities to litigation under 42 U.S.C. § 1983.

In *Monell v. Department of Social Services*, 436 U.S. 658 (1978), the Court held that Congress, in enacting section 1983, did not intend that municipalities be subject to suit under *respondeat superior* theories of liability. The "heightened pleading" standard applied by the court below is essential to vindicate this immunity from suit. Invalidating the heightened pleading standard, by contrast, would allow every incident of alleged police misconduct to form the basis of a claim against the municipal employer based solely on a conclusory allegation of "failure to train." *Amici* submit that such a result is plainly contrary to the intent of Congress to preserve municipalities' immunity from suit for the torts of their employees.

Because the Court's decision will have a direct impact on this issue of fundamental importance to *amici* and their members, *amici* submit this brief to assist the Court in its resolution of the case.[1]

STATEMENT OF THE CASE

This case arises out of two incidents of alleged police misconduct. One incident involved petitioners Donald and Gerald Andert, five members of the Lealos family, and law enforcement officers of respondents City of Grapevine, Texas, and the Tarrant County Narcotics Intelligence and Coordination Unit (TCNICU). This incident allegedly occurred at 8 p.m. on January 30, 1989, at Gerald Andert's residence in Southlake, Texas, when police officers executed a search warrant. The other incident involved petitioners Charlene, Kenneth, and Travis Leatherman, and law enforcement officers of respondents City of Lake Worth, Texas, Tarrant County and TCNICU. This incident allegedly occurred on May 20, 1989, when police officers executed a search warrant at the Leatherman residence.

[1] The parties' letters of consent to the filing of this brief have been filed with the Clerk pursuant to the Rule 37.3 of the Rules of this Court.

On November 22, 1989, the Leathermans sued Tarrant County and TCNICU in state court under 42 U.S.C. § 1983 alleging that the search of their residence violated, *inter alia*, the Fourth, Fifth and Fourteenth Amendments of the United States Constitution. *See* J.A. 3-8. Defendants removed the suit to federal district court and moved to dismiss under Fed. R. Civ. P. 12(b)(6) or for summary judgment. J.A. 9-11. On February 1, 1990, the district court granted the motion. J.A. 19. On February 8, 1990, the Leathermans moved to vacate the dismissal. J.A. 21-24. On March 8, 1990, the district court granted the motion and permitted the filing of an amended complaint. J.A. 26-27.

In their amended complaint, the Leathermans added the Anderts and Lealoses as plaintiffs and added the January 30, 1989, incident at Gerald Andert's residence. J.A. at 28-52. The amended complaint also added the cities of Lake Worth and Grapevine as defendants.[2] *Id.* at 32. The amended complaint alleged that the two searches violated the Fourth and Fourteenth Amendments in various respects. *See Plaintiff's First Amended Complaint* ¶¶ 21-22, 29-30, 35, J.A. 36-37, 41-42, 46. The amended complaint recited language from *City of Canton v. Harris*, 489 U.S. 378, 390 (1989), and generally alleged that the local governmental defendants had each

> failed to formulate and implement an adequate policy to train its officers on the Constitutional limitations restricting the manner in which search warrants may be executed; and that in light of the duties commonly assigned to officers who execute search warrants, the need for additional or different training was so obvious that the conduct of [d]efendant . . . , by and through its official policymaker . . ., demon-

[2] The amended complaint also named Tim Curry, District Attorney of Tarrant County and Director of TCNICU, and Don Carpenter, Sheriff of Tarrant County, as defendants. J.A. 31. Curry and Carpenter were sued in their official capacity only. *Id.* at 28.

strates a deliberate indifference to the Constitutional rights of persons likely to be affected by such failure to train.

See, e.g., Plaintiff's First Amended Complaint, ¶ 23, J.A. 37-38.[3]

Defendants TCNICU, Tarrant County, Carpenter and Curry moved to dismiss under Fed. R. Civ. P. 12(b)(6) or for summary judgment. J.A. 53-61. The City of Grapevine also moved to dismiss under Rule 12(b)(6). Pet. App. 26a. Applying the Fifth Circuit's "heightened pleading" standard,[4] the district court held with respect to petitioners' inadequate training claims that their amended complaint did not allege sufficient facts to establish the existence of a municipal policy or custom of inadequate training or deliberate indifference on the part of the municipal policymakers.[5] Pet. App. 39a-40a. The district court dismissed the complaint as to all defendants, including non-moving defendant Lake Worth.

[3] Petitioners also alleged that TCNICU had violated their fourth amendment rights by adopting a custom or policy of "caus[ing] the issuance and execution of search warrants predicated on no more than the detection of 'odors associated' with illegal drug manufacturing." *See id.* at ¶¶ 35-38, J.A. 46-48.

[4] *See, e.g., Palmer v. City of San Antonio*, 810 F.2d 514, 516-17 (5th Cir. 1987); *Elliot v. Perez*, 751 F.2d 1472, 1477-82 (5th Cir. 1985).

[5] With respect to petitioners' claim that TCNICU had adopted a policy of obtaining search warrants "predicated on no more than the odors associated with illegal drug manufacturing," the district court held that sufficient facts had not been pleaded to establish the existence of a custom and practice. Pet. App. 40a. The district court alternatively relied on *Johnson v. United States*, 333 U.S. 10 (1948), *United States v. Rivera*, 595 F.2d 1095 (5th Cir. 1979), and *United States v. Ogden*, 572 F.2d 501 (5th Cir. 1978), to hold that the presence of the odors associated with narcotics manufacturing established probable cause for a search warrant and thus negated any claim of a Fourth Amendment violation. Pet. App. 41a-43a.

The court of appeals affirmed. Relying on the "heightened pleading" standard it adopted in *Elliot* and *Palmer*,[6] the court held that the complaint "f[ell] short of alleging the requisite facts to establish a policy of inadequate training." Pet. App. 12a. In the court of appeals' view, petitioners were required to "demonstrate[] 'at least a pattern of similar incidents in which citizens were injured' . . . [in order] to establish the official policy requisite to municipal liability under section 1983." *Id.* at 12a-13a (citations omitted). Because the complaint also "fail[ed] to state any facts with respect to the adequacy (or inadequacy) of the police training," the court of appeals affirmed the dismissal of the complaint. *Id.* at 13a.

[6] *See supra* note 4. Every other court of appeals has likewise adopted some form of the "heightened pleading" standard in suits brought under section 1983. *See Dewey v. University of New Hampshire*, 694 F.2d 1, 3 (1st Cir. 1982), *cert. denied*, 461 U.S. 944 (1983); *Gill v. Mooney*, 824 F.2d 192, 194 (2d Cir. 1987); *Bartholomew v. Fischl*, 782 F.2d 1148, 1151-52 (3d Cir. 1986); *Gooden v. Howard County, Md.*, 954 F.2d 960, 969-70 (4th Cir. 1992) (en banc); *Chapman v. City of Detroit*, 808 F.2d 459, 465 (6th Cir. 1986); *Caldwell v. City of Elwood*, 959 F.2d 670, 672 n.4 (7th Cir. 1992); *Brown v. Frey*, 889 F.2d 159, 170 (8th Cir. 1989); *Branch v. Tunnell*, 937 F.2d 1382, 1386 (9th Cir. 1991); *Sawyer v. County of Creek*, 908 F.2d 663, 667 (10th Cir. 1990); *Arnold v. Board of Educ. of Escambia County Ala.*, 880 F.2d 305, 309-10 (11th Cir. 1989); *Crawford-El v. Britton*, 951 F.2d 1314, 1317 (D.C. Cir. 1991). The Ninth Circuit, however, has rejected the application of the "heightened pleading" standard in the municipal liability context. *See Karim-Panahi v. Los Angeles Police Dept.*, 839 F.2d 621, 624 (9th Cir. 1988) ("[A] claim of municipal liability under section 1983 is sufficient to withstand a motion to dismiss 'even if the claim is based on nothing more than a bare allegation that the individual officers' conduct conformed to official policy, custom, or practice.'") (citation omitted).

SUMMARY OF ARGUMENT

In *Monell v. Department of Social Services*, 436 U.S. 658, 691 (1978), this Court held that Congress, in enacting section 1983, did not intend for suits to be brought against municipalities under *respondeat superior* theories of liability. The Court thus concluded "that a local government *may not be sued* under § 1983 for an injury inflicted solely by its employees or agents." *Id.* at 694 (emphasis added). *Monell*'s rule embodies an "immunity from suit" which, as this Court has recognized, is "effectively lost if a case is erroneously permitted" to proceed to discovery and trial. *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). The heightened pleading standard applied by the court of appeals is thus necessary to vindicate this immunity from suit.

Supporting the conclusion that *Monell*'s rule states an immunity from suit is the limited nature of section 1983's abrogation of municipal immunity. While section 1983 abrogated municipal immunity when the municipality had itself caused a constitutional violation, it did not abrogate those "immunities 'well grounded in history and reason,'" *Imbler v. Pachtman*, 424 U.S. 409, 418 (1976) (citation omitted), that are compatible with its purpose. *Owen v. City of Independence*, 445 U.S. 622, 638 (1980). At the time of section 1983's enactment, municipalities were immune from suit for torts based on their governmental functions as well as torts based on the acts of their employees. There is no evidence that the Forty-Second Congress intended to alter the nature of the common law immunity from suit municipalities enjoyed for the torts of their employees.

In addition, many of the same societal costs which led this Court to conclude that an official's qualified immunity embodies an immunity from suit, *see Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982), compel the recognition that municipalities retain an immunity from suit and not just a defense to liability. These costs, which underscore the need for heightened pleading, include the costs of litigation, the diversion of official energy, and dampening of the ardor of public officials. Moreover, allowing insubstantial suits against municipalities to proceed to discovery and trial entails additional costs such as the *de facto* imposition of *respondeat superior* liability when municipalities are forced to settle insubstantial claims and the needless interjection of the federal courts into local matters.

Contrary to petitioners' assertion, the "heightened pleading" standard neither violates the concept of "notice pleading" embodied in Fed. R. Civ. P. 8(a) nor, where pre-complaint discovery is available, the Rules Enabling Act, 28 U.S.C. § 2072(b). The Federal Rules of Civil Procedure "[can]not abridge, enlarge or modify any substantive right," 28 U.S.C. § 2072(b); the "notice pleading" of Rule 8 cannot abridge a local government's immunity from suit. Thus, where pre-complaint discovery is available, the "heightened pleading" standard does not abridge petitioner's substantive right under section 1983. Moreover, in these circumstances the "heightened pleading" standard is required by the Rules Enabling Act to prevent the "notice pleading" of Rule 8 from abridging a local government's immunity from suit.

ARGUMENT

THE HEIGHTENED PLEADING STANDARD IS NECESSARY TO VINDICATE A MUNICIPALITY'S IMMUNITY FROM SUIT UNDER SECTION 1983 FOR AN INJURY INFLICTED SOLELY BY ITS EMPLOYEES.

A core principle of section 1983 doctrine is that "a local government *may not be sued* under § 1983 for an injury inflicted solely by its employees or agents." *Monell v. Dept. of Soc. Servs.*, 436 U.S. at 694 (emphasis added). *Monell*'s rule states an immunity from suit and not just a defense to liability. While in enacting section 1983 Congress abrogated municipal immunity where the municipality had itself caused a constitutional violation, section 1983 did not alter the common law immunity from suit which municipalities enjoyed for the torts of their officers and agents. The "heightened pleading" requirement applied by the court of appeals is necessary to ensure that a local governmental entity has not been sued merely because it employed a tortfeasor. This rule is essential to vindicate respondents' immunity from suit, which will be "effectively lost" if this case is erroneously allowed to proceed to discovery and trial. *Mitchell*, 472 U.S. at 526. The judgment of the court of appeals should therefore be affirmed.

A. A Local Governmental Entity Is Immune From Suit Under Section 1983 Unless Its Policy Or Custom Has Caused A Constitutional Violation.

In *Monroe v. Pape*, 365 U.S. 167 (1961), this Court first addressed the issue of a municipality's immunity from suit under section 1983.[7] In *Monroe*, petitioners

[7] 42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

"'alleged [that] the City [was] liable for the acts of its police officers, by virtue of *respondeat superior*.'" *Monell*, 436 U.S. at 708-10 (Powell, J., concurring) (*quoting Brief for Petitioners* at 21, *Monroe* (O. T. 1960, No. 39)). This Court upheld the dismissal of the complaint with respect to the City, holding "that Congress did not undertake to bring municipal corporations within the ambit of § [1983]." *Monroe*, 365 U.S. at 187. As this Court subsequently noted, *Monroe* "completely immunize[d] municipalities from suit under § 1983." *Monell*, 436 U.S. at 695; *see also Owen*, 445 U.S. at 669 n.10 (Powell, J., dissenting).

Seventeen years later in *Monell*, this Court "overrule[d] *Monroe* . . . insofar as it h[eld] that local governments are wholly immune from suit under § 1983." 436 U.S. at 663. While *Monell* held that Congress, in enacting section 1983, had intended to create a cause of action against municipalities, it did so only when the municipality's custom or policy was the "moving force" behind a violation of constitutional rights, *i.e.*, when the municipality substantially caused the violation. 436 U.S. at 690-95. *Monell* expressly reaffirmed *Monroe's* rejection of the notion that a municipality could "be held liable *solely* because it employs a tortfeasor." *Id.* at 691. The Court thus concluded "that a local government *may not be sued* under § 1983 for an injury inflicted solely by its employees or agents." *Id.* at 694 (emphasis added).

The conclusion that *Monell's* rule states an immunity from suit—an entitlement to not be subjected "either to the costs of trial or to the burdens of broad-reaching discovery," *Harlow*, 457 U.S. at 817-18—and not just a defense to liability, *see Mitchell*, 472 U.S. at 526,[8] is

[8] *See also Van Cauwenberghe v. Biard*, 486 U.S. 517, 523-27 (1988) (claim of immunity from civil process grounded in doctrine

supported by this Court's precedents construing the scope of immunities under section 1983. While this Court has not, subsequent to *Monell*, examined the question of the nature of the immunity municipalities retained after the enactment of section 1983, there can be little dispute that this immunity is an *immunity from suit*. As this Court has recognized, section 1983 did not abrogate those "immunities 'well grounded in history and reason.'" *Imbler v. Pachtman*, 424 U.S. 409, 418 (1976) (quoting *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951)). As *Imbler* notes, "§ 1983 is to be read in harmony with general principles of tort immunities and defenses rather than in derogation of them." 424 U.S. at 418. Accordingly, this Court has construed section 1983 as incorporating those immunities "well established at common law at the time" of enactment whose "rationale is compatible with the purposes of" section 1983. *Owen*, 445 U.S. at 638.

At the time section 1983 was enacted, it was well settled that municipalities were immune from suit for torts committed in the exercise of their governmental functions, including the torts of their employees. This Court recognized as much in *Owen*, characterizing the "common law immunity for governmental functions [as] . . . more comparable to *an absolute immunity from liability for conduct of a certain character, which defeats a suit at the outset*, than to a qualified immunity, which 'depends upon the circumstances and motivations of [the official's] actions, as established by evidence at trial.'" 445 U.S. at 647 n.29 (citation omitted; emphasis added). No category of cases more amply demonstrates the validity of *Owen*'s recognition that, at common law, the municipal tort immunity for governmental functions embodied an immunity from suit, than those suits brought against municipalities for the torts committed by their employees—including police—in the exercise of governmental functions. The decisions of the courts of more than twenty States affirming the sustaining of demurrers or ordering non-suits in actions brought against municipalities on *respondeat superior* theories conclusively demonstrate that, at common law, municipalities were immune from suit for such claims. *See, e.g., Fox v. The Northern Liberties*, 3 Watts & Serg. (Pa.) 103 (1841) (affirming trial court's sustaining of demurrer to action against municipality alleging superintendent of police had illegally seized plaintiff's horse); *Prather v. City of Lexington*, 52 Ky. (13 B. Mon.) 559, 564 (1852) (affirming sustaining of demurrer to declaration that city was liable for negligence of mayor and officers in failing to prevent destruction of home by mob; "the present action can not be maintained against the city"); *Dargan v. Mayor of Mobile*, 31 Ala. 469, 478 (1858) (affirming trial court's sustaining of demurrer in suit brought against municipality alleging negligent police conduct); *Sherbourne v. Yuba County*, 21 Cal. 113 (1862) (affirming sustaining of demurrer to complaint alleging county liable for misfeasance of employees).[9]

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of specialty "should be characterized as the right not to be subject to a binding judgment" and thus denial of claim not an appealable collateral order); *Abney v. United States*, 431 U.S. 651, 660-61 (1977) (". . . Double Jeopardy Clause protects an individual against more than being subjected to double punishments. It is a guarantee against being twice put to *trial* for the same offense.") (emphasis in original); *Dombrowski v. Eastland*, 387 U.S. 82, 85 (1967) (per curiam) ("doctrine of legislative immunity . . . protect[s legislators] not only from consequences of litigation's results but also from the burden of defending themselves") (internal citations omitted).

[9] *See also* the following:

Alabama. Campbell's Adm'x v. City Council, 53 Ala. 527, 530-31 (1875) (affirming sustaining of demurrer on grounds municipality not liable for omission of police).

District of Columbia. Grumbine v. Mayor, 2 McArthur (D.C.) 578, 581-82 (1876) (affirming sustaining of demurrer to declaration alleging city liable when police officers unlawfully arrested plaintiff; "there is no foundation upon which this action can be maintained against the defendant").

Georgia. Harris v. City of Atlanta, 62 Ga. 290, 295 (1879) (affirming grant of non-suit to city when plaintiff alleged city and police

liable for false imprisonment); *McElroy v. City Council of Albany*, 65 Ga. 387, 388-89 (1880) (affirming sustaining of demurrer to declaration alleging city liable when city watchman committed assault and battery).

Illinois. City of Chicago v. Turner, 80 Ill. 419, 423 (1875) (reversing jury verdict finding city liable for acts of its servants in executing unlawful ordinance; "plaintiff's declaration disclose[d] no cause of action"); *Wilcox v. City of Chicago*, 107 Ill. 334, 340 (1883) (affirming sustaining of demurrer to declaration alleging city liable for negligence of employee in driving fire department wagon); *Blake v. City of Pontiac*, 49 Ill. App. 543, 554 (1893) (affirming sustaining of demurrer to declaration alleging city liable for unlawful arrest and inhumane jailhouse conditions).

Indiana. Town of Laurel v. Blue, 1 Ind. App. 128, 131 (1891) (reversing judgment and ordering trial court to sustain demurrer to complaint alleging city liable when town marshal falsely arrested plaintiff).

Iowa. Ogg v. City of Lansing, 35 Iowa 495, 498-99 (1872) (affirming sustaining of demurrer to petition alleging city liable when its employees, in seeking plaintiff's assistance in removing corpse, failed to advise of deadly disease; "[t]he consequences of the doctrine contended for by appellant would be startling and alarming"); *Colwell v. City of Boone*, 51 Iowa 687, 689 (1879) (affirming sustaining of demurrer to petition alleging city liable for police officer's unlawful assault and battery); *Easterly v. Town of Irwin*, 99 Iowa 694, 698 (1896) (affirming sustaining of demurrer to petition alleging city liable when police falsely arrested and imprisoned plaintiff).

Kansas. Peters v. City of Lindsborg, 40 Kan. 654, 656-57 (1889) (affirming sustaining of demurrer to petition alleging city liable when police officers falsely arrested plaintiff; "we believe the petition does not state a cause of action against the city").

Kentucky. Jolly's Adm'x v. City of Hawesville, 89 Ky. 279, 282 (1889) (affirming sustaining of demurrer to petition alleging city liable "for personal injury resulting from the malfeasance or negligence of police officers"); *Taylor v. City of Owensboro*, 98 Ky. 271, 278 (1895) (affirming sustaining of demurrer to petition alleging city liable for unlawful arrest, conviction and confinement; "the principle of *respondeat superior* does not apply").

Maine. Brown v. Vinalhaven, 65 Me. 402, 404-05 (1876) (ordering non-suit in action alleging town liable for medical malpractice by doctor it employed; "the rule *respondeat superior*" does not apply and "the action cannot be maintained upon the facts alleged

in the writ"); *Lynde v. City of Rockland*, 66 Me. 309, 315 (1876) (ordering non-suit where declaration alleged city liable for trespass when its board of health took possession of plaintiff's hotel for use as hospital during epidemic; "That no action against the city can be maintained upon such facts as are here alleged must be regarded as settled law in this state."); *Barbour v. City of Ellsworth*, 67 Me. 294, 295 (1876) (ordering non-suit to plaintiff's declaration that town liable when its officers quarantined plaintiff in hospital and failed to provide proper medical care).

Massachusetts. Hafford v. City of New Bedford, 82 Mass. (16 Gray) 297, 302 (1860) ("no action will lie against the city for [the] negligence or improper conduct [of members of fire department], while acting in discharge of their official duty").

Mississippi. Sutton & Dudley v. Board of Police, 41 Miss. 236, 239-40 (1866) (affirming judgment on pleadings for county; while "[p]rivate corporations are responsible for the tortious acts of their agents . . . generally this is not the case with municipal corporations").

Missouri. Murtaugh v. City of St. Louis, 44 Mo. 479, 481-82 (1869) (reversing judgment for plaintiff in suit against city to recover for injuries caused by negligence and misconduct of city hospital employees; "it [is] obvious that the action can not be maintained"); *Heller v. Mayor of Sedalia*, 53 Mo. 159, 160-61 (1873) (affirming sustaining of demurrer to petition alleging city liable for fire department's negligence in failing to extinguish fire; "[t]he doctrine of '*respondeat superior*' does not apply").

New Hampshire. Edgerly v. Concord, 59 N.H. 341, 343 (1879) (dismissing complaint alleging city liable for improper use of fire hydrant hose by city's officers).

New Jersey. Pray v. Mayor of Jersey City, 32 N.J.L. 394, 398 (1868) (reversing verdict for plaintiff and ordering non-suit; "the neglects of agents of the public, in the discharge of their legitimate functions, cannot constitute the basis of an action in behalf of an individual who has sustained a particular damage").

New York. Martin v. Mayor of Brooklyn, 1 Hill 545, 551 (N.Y. Sup. Ct. 1841) (affirming sustaining of demurrer; "no case has been cited wherein . . . municipal corporations are liable for omissions of a duty specifically imposed by statute on one of their officers"); *Maximilian v. Mayor of New York*, 62 N.Y. 160, 170 (1875) (affirming sustaining of demurrer in action brought against city for death caused by driver of city ambulance and rejecting rule of *respondeat superior*); *Ham v. Mayor of New York*, 70 N.Y. 459, 463-65 (1877) (setting aside jury verdict for plaintiff on claim that city was

liable for negligent acts of employees of city department of public instruction because "the rule of *respondeat superior* could not well be applied" and "it [was] apparent that the plaintiff could not maintain the action").

Ohio. Western College v. City of Cleveland, 12 Ohio St. 375, 380 (1861) (affirming sustaining of demurrer to petition alleging city liable when its officers took control of plaintiff's building and failed to prevent its destruction in riot).

Pennsylvania. Elliott v. City of Philadelphia, 75 Pa. 347, 353-54 (1874) (affirming sustaining of demurrer to declaration alleging city liable when police falsely arrested plaintiff and failed to take proper custody of his horse).

Rhode Island. Kelley v. Cook, 21 R.I. 29, 31-33 (1898) (sustaining demurrer to declaration alleging city liable when police unlawfully arrested and confined and negligently failed to provide medical care to plaintiff's intestate).

South Carolina. Parks v. City Council of Greenville, 21 S.E. 540, 541 (S.C. 1895) (affirming non-suit on grounds that "a municipal corporation . . . is not liable to an action for damages sustained by the tort of any of its officers or agents, unless it is made so by some statute to that effect").

Texas. City of Corsicana v. White, 57 Tex. 382, 384 (1882) (petition alleging city liable when mayor and marshal unlawfully arrested, imprisoned and extorted money from plaintiff "was bad upon general demurrer. . . . If [mayor and marshal] did this without authority, then they have made themselves personally liable for trespass; but there is no cause of action against the city."); *McFadin v. City of San Antonio*, 22 Tex. Civ. App. 140, 141 (1899) (affirming sustaining of demurrer to petition alleging city liable for illegal arrest and conviction of plaintiff).

Utah. Royce v. Salt Lake City, 15 Utah 401, 410 (1897) (reversing judgment for plaintiff; trial "court erred in refusing to grant . . . nonsuit" where plaintiff alleged city was liable for his unlawful arrest and conviction).

West Virginia. Brown's Adm'r v. Town of Guyandotte, 12 S.E. 707, 708 (W. Va. 1890) (affirming sustaining of demurrer to declaration alleging municipality liable for negligence of jailer in death of inmate in jailhouse fire).

Wisconsin. Hayes v. City of Oshkosh, 33 Wis. 314, 318-19 (1873) (members of fire department act "as public officers, or officers of the city charged with a public service, for whose negligence or misconduct in the discharge of official duty no action will lie against the city").

These numerous decisions amply demonstrate that, at common law, municipalities retained an immunity from suit for torts committed by their employees or agents.[10] The commentators also support this view. *See, e.g.*, Thomas G. Shearman & Amasa A. Redfield, *A Treatise on the Law of Negligence* §§ 139, 140 (1869) ("Police officers are held not to be public officers within the rule making the corporation answerable for their acts."; "A municipal corporation is not answerable for the illegal and wrongful acts of its officers, though done *colore officii*."); Note, *Liability of Cities for the Negligence and Other Misconduct of their Officers and Agents*, 30 Am. St. Rep. 376, 401 (1893) ("Nor is a municipality answerable for any wantonness, recklessness, or other wrong committed by a policeman while in the discharge of his duty.").[11]

[10] Long after the enactment of section 1983, state courts continued to recognize that municipalities were immune from suit for the torts of their employees. *See, e.g., Gillmor v. Salt Lake City*, 32 Utah 180, 185 (Utah 1907) (affirming sustaining of demurrer to suit alleging city liable for property damage caused by trespassing police officers; "the allegations of the complaint . . . leave no room for doubt that no cause of action is stated against the city"); *Lynch v. City of North Yakima*, 37 Wash. 657, 661-62, 664 (1905) (affirming sustaining of demurrer to complaint alleging city liable when fire chief failed to warn teamster employee of horse's viciousness); *Nicholson v. City of Detroit*, 129 Mich. 246, 259 (1902) (affirming sustaining of demurrer to suit alleging city liable for negligence of officers in failing to provide employee with workplace safe from disease; "were the plaintiff's action to be sustained, it would overturn the principle upon which nearly all of the cases . . . rest"); *Craig v. City of Charleston*, 180 Ill. 154, 156 (1899) (affirming sustaining of demurrer to suit alleging city liable for unlawful arrest; "the weight of authority . . . is against plaintiff's contention").

[11] *See also* Edward F. White, *Negligence of Municipal Corporations* § 23 at 29 (1920) ("no private action will lie against a municipal corporation for damages sustained . . . in consequence of the trespasses or misfeasances of its officers or agents in the performance of [a public or governmental] duty") (footnote omitted).

The Forty-Second Congress was well aware of the nature of municipal tort immunity at common law. During the debates, members made "frequent references to cases decided by . . . the Supreme Courts of the several states." *Monell*, 436 U.S. at 669; *see also Owen*, 445 U.S. at 677 (Powell, J., dissenting) (describing Forty-Second Congress as "thoroughly versed in current legal doctrines"). During the Senate debate on the Sherman amendment,[12] Senator Stevenson, an opponent, in "stat[ing] the prevailing law," *Owen*, 445 U.S. at 642, quoted extensively from the discussion of municipal liability in *Prather v. City of Lexington*, 52 Ky. (13 B. Mon.) 559 (1852), to criticize the Sherman amendment's proposed extension of liability. Cong. Globe, 42d. Cong., 1st Sess., 762 (1871) (hereinafter Globe). Significantly, in *Prather* the complaint sought to hold the municipality liable for the negligence of its officers in failing to prevent damage to a dwelling caused by a mob. 52 Ky. (13 B. Mon.) at 559. The Kentucky Court of Appeals affirmed the trial court's sustaining of a demurrer to the complaint, concluding that "the present action can not be maintained against the city." *Id.* at 564. The Sherman amendment was, as *Monell* notes, "the only form of vicarious liability presented to [Congress]," 436 U.S. at 692 n. 57 & 693, and would have squarely abrogated the immunity from suit of *Prather*. Its rejection demonstrates that, in enacting section 1983, the Forty-Second Congress could hardly have intended to alter the immunity from suit municipalities enjoyed for the torts of their employees.

In the House, opponents of the Sherman amendment questioned both the constitutional power of Congress to impose duties and obligations on municipalities, *see* Globe at 791 (statement of Rep. Willard); *id.* at 793-94

[12] The Sherman amendment "would have held a municipal corporation liable for damage done to the person or property of its inhabitants by *private* persons 'riotously and tumultuously assembled.'" *Monell*, 436 U.S. at 664 (emphasis in original) (citation omitted).

(statement of Rep. Poland), *id.* at 794-95 (statement of Rep. Blair), *id.* at 798 (statement of Rep. Bingham), and the potential financial impact on municipalities. *See, e.g.*, *id.* at 789 (statement of Rep. Kerr) ("How are [cities] to perform their necessary and customary functions if you may send a Federal officer to put his arms into the treasury of the . . . city in this way and withdraw therefrom all the revenues, or if you can authorize the sale of a . . . [building] . . .?"); *id.* at 795 (statement of Rep. Blair) ("If the Government of the United States can [make a city liable for damages occurring in a riot], may it not utterly destroy the municipality?").

Thus, while the Forty-Second Congress, in enacting section 1983, intended to abrogate municipal immunity for those actionable torts when the municipality had itself been "the moving force [behind] the constitutional violation," *see Monell*, 436 U.S. at 694, there is no evidence that the Congress intended to alter the nature of the common law immunity from suit municipalities enjoyed for the torts of their employees. Congress, having viewed the "creation of a federal law of *respondeat superior*" as imposing an unconstitutional "obligation to keep the peace," *id.*, could hardly have intended to transmogrify the common law immunity from suit in such actions into a mere defense to liability. And Congress, in its silence, could hardly have intended to alter the nature of the immunity when doing so would increase the leverage of plaintiffs to obtain settlements—thereby resulting in the *de facto* imposition of the *respondeat superior* liability it explicitly rejected. *Cf. Harris*, 489 U.S. at 392 ("permitting cases against cities for their 'failure to train' employees to go forward under § 1983 on a lesser standard of fault would result in *de facto respondeat superior* liability").

Clearly then, Congress, in enacting section 1983, did not alter the nature of the common law immunity enjoyed by municipalities for the torts of their employees. *See Imbler*, 424 U.S. at 418. *Monell*'s rule—"that a local

government *may not be sued* under § 1983 for an injury inflicted solely by its employees or agents," 436 U.S. at 693-94, is thus more than just a defense to liability. It is instead "an entitlement not to stand trial under certain circumstances." *Mitchell*, 472 U.S. at 525. As such, *Monell* embodies "an entitlement not to stand trial or face the other burdens of litigation, conditioned on the resolution of the essentially legal question," *id.* at 526, of whether the plaintiff has demonstrated that a municipal policy or custom has caused a violation of constitutional rights.[13]

B. The Substantial Costs Which Attend Insubstantial Section 1983 Claims Brought Against Local Governmental Entities Require Recognition That *Monell*'s Rule States An Immunity From Suit.

While the intent of the Forty-Second Congress is clear, if this Court declines to follow the historical record it should examine the societal costs attendant with holding that the immunity municipalities retain for the torts of their employees is merely a defense to liability. *See, e.g., Harlow*, 457 U.S. at 813-18. Many of the same societal costs that led this Court to conclude that qualified immunity embodies "an *immunity from suit* rather than a mere defense to liability," *Mitchell*, 472 U.S. at 526, com-

[13] Petitioners mistakenly rely on *Owen v. City of Independence*, 445 U.S. 622 (1980), to argue that "[u]nder Section 1983, local governmental entities are not entitled to assert either an absolute or qualified immunity from suit." Pet. Br. 17. While *Owen* does indeed hold that local governmental entities cannot assert a qualified immunity defense, *see* 445 U.S. at 638, by its own terms *Owen* applies when the "execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy," is the proximate cause of the constitutional violation. *Id.* at 657-58 (quoting *Monell*, 436 U.S. at 694). *Owen* is thus applicable only in those suits recognized by *Monell* as stating a valid section 1983 claim against a local government. It does not control when a suit against a local government is based, in reality, on no more than the municipality's having employed a tortfeasor.

pel the same conclusion in analyzing the nature of the immunity which municipalities retain under section 1983 for the torts of their employees. Indeed, section 1983 suits against municipalities entail substantial societal costs beyond those implicated in the qualified immunity context. An assessment of these costs supports the recognition that the immunity of local governmental entities is an immunity from suit and not just a defense to liability.

In *Harlow*, this Court noted that allowing insubstantial claims against government officials to go forward entails significant

> social costs includ[ing] the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office. Finally, there is the danger that fear of being sued will 'dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties.'

457 U.S. at 814 (citations omitted).

These costs are no less present merely because a municipality rather than one of its officials is the defendant. The expenses of litigation remain; the time and energy of public officials is no less diverted from public issues to defending the municipality against a lawsuit. And although when a municipality is sued the official need not fear personal liability, able citizens are nevertheless deterred from seeking public office by the prospect of spending a significant portion of their time defending their employer from lawsuits.

Suits against a municipal defendant equally dampen the ardor of public officials. As this Court has recognized, the demonstration of the existence of a municipal custom or policy focuses on the decisions of the relevant policy making officials. *See Pembaur v. City of Cincinnati*, 475 U.S. 469, 483 (1986). In such cases the munici-

pality and the policy making officials are not severable; when the city is sued, it is the official who bears the brunt of depositions and other broad-reaching discovery. *Cf. Owen*, 445 U.S. at 668-69 (Powell, J., dissenting) ("Responsible local officials will be concerned about potential judgments against their municipalities for alleged constitutional torts. . . . If officials must look over their shoulders at a strict liability for unknowable constitutional deprivations, the resulting degree of governmental paralysis will be little different from that caused by fear of personal liability.") (citations omitted).

Indeed, allowing insubstantial suits against municipalities to proceed to discovery and trial entails additional costs beyond those which this Court has recognized in the qualified immunity context. Allowing such suits to go forward increases the costs of municipalities and imparts the suits with nuisance value. *Cf. Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 548 (1949) (recognizing that derivative "[s]uits sometimes were brought not to redress real wrongs, but to realize upon their nuisance value"). Confronted with the specter of incurring additional litigation costs and perhaps the risks of trial, municipalities are frequently forced to settle. *See* Andrew Blum, *Lawsuits Put Strain on City Budgets*, Nat'l L.J., May 16, 1988, at 1, 33 (" 'the economics of defense [are] such that governments and insurance carriers will settle weak cases' ") (quoting research paper of Academy for State and Local Government) (hereinafter *City Budgets*). These settlements amount to the *de facto* imposition of the *respondeat superior* liability this Court rejected in *Monell*. *Cf. Harris*, 489 U.S. at 392 ("permitting cases against cities for their 'failure to train' employees to go forward under § 1983 on a lesser standard of fault would result in *de facto respondeat superior liability*").

Allowing insubstantial claims to go forward also improperly interjects the federal courts into the affairs of

local governments. Section 1983 "is not a 'federal good government act' for municipalities." *Id.* at 396 (O'Connor, J., concurring). Rather, in the municipal liability context its purpose is limited to providing a cause of action when a municipality has itself caused a violation of constitutional rights. *Id.* Allowing insubstantial claims to go forward not only frustrates Congress's purpose in enacting section 1983, it also ignores the principle of federalism reflected in our constitutional structure. *Cf. Collins v. City of Harker Heights*, 112 S.Ct. 1061, 1071 (1992) ("Decisions concerning the allocation of resources to individual programs . . . involve a host of policy choices that must be made by locally elected representatives, rather than by federal judges . . . ."); *Harris*, 489 U.S. at 392 (federal courts should not engage "in an endless exercise of second-guessing municipal employee-training programs"); *see also Rizzo v. Goode*, 423 U.S. 362, 379-80 (1976).

Municipalities, however, are not alone in bearing the costs of insubstantial section 1983 suits. Since *Monroe*, the federal courts have borne the ever increasing burden of such suits. *See Patsy v. Board of Regents*, 457 U.S. 496, 533 (1982) (Powell, J., dissenting); Paul M. Bator *et al.*, *Hart and Wechsler's The Federal Courts and The Federal System* 1242 (3d ed. 1988); George C. Pratt, Foreword to Martin A. Schwartz & John E. Kirklin, *Section 1983 Litigation: Claims, Defenses, And Fees* at vii (ed. 1986). Section 1983 suits against municipalities are very much a part of this litigation explosion. *See City Budgets* at 1 ("[f]rom 1982 to 1985 alone, the number of suits against municipalities jumped 100 percent" and attributing increase to "non-traditional use" of section 1983). Not only are such cases "more burdensome than the average non-civil rights case," Theodore Eisenberg & Stewart Schwab, *The Reality Of Constitutional Tort Litigation*, 72 Cornell L. Rev. 641, 675 (1987), they are also less successful than non-civil rights cases. *See generally id.* at 678-82 (Even under study's

"broad measure of success, [section 1983] plaintiffs succeed about one-third of the time. . . . By contrast, plaintiffs in contested non-civil rights cases succeed over 80% of the time.") (footnotes omitted). The greater burden imposed by the typical section 1983 case, coupled with the greater likelihood that such cases have no foundation, provides additional justification for imposing a heightened pleading requirement.

In sum, allowing insubstantial claims against municipalities to proceed to discovery and trial imposes significant costs on municipalities,[14] the federal courts, and our constitutional structure. These societal costs compel this Court's recognition that *Monell*'s rule "that a local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents," 436 U.S. at 694, embodies "an *immunity from suit* rather than a mere defense to liability." *Mitchell*, 472 U.S. at 526 (emphasis in original).

C. The Heightened Pleading Standard Is Necessary To Protect A Local Governmental Entity From The Loss Of Its Immunity From Suit And Violates Neither The Notice Pleading Of Rule 8 Nor The Rules Enabling Act.

The court of appeals' heightened pleading standard protects a local governmental entity from the effective loss of its immunity from suit when a claim is, in reality, based on no more than the entity's having employed a tortfeasor. In *Harlow*, this Court recognized that an immunity from suit embodies an entitlement to not be subjected "either to the costs of trial or to the burdens of broad-reaching discovery." 457 U.S. at 817-18. Because an immunity from suit is "an entitlement not to stand trial under certain circumstances," *Mitchell*, 472 U.S. at

[14] *See City Budgets* at 32 (discussing survey of National Institute of Municipal Law Officers estimating that "local governments nationwide paid nearly $2 billion to Sec. 1983 plaintiffs" between 1980 and 1985).

525, which "is effectively lost if a case is erroneously permitted to go" forward, *id.* at 526; it is entirely appropriate to resolve insubstantial claims on either summary judgment or a motion to dismiss prior to discovery. *Id.*; *see also Harlow*, 457 U.S. at 814-818; *Butz v. Economou*, 438 U.S. 478, 507-08 (1978). The heightened pleading rule is an appropriate device for resolving insubstantial claims prior to discovery and vindicates *Monell*'s rule "that a local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents." 436 U.S. at 694. As such, the heightened pleading rule violates neither the concept of notice pleading nor the Rules Enabling Act, 28 U.S.C. § 2072(b).

To be sure, as a general matter the Federal Rules of Civil Procedure do not require plaintiffs to set forth specific facts to support their allegations. *See* Fed. R. Civ. P. 8(a)(2) (requiring "a short and plain statement of the claim showing that the pleader is entitled to relief"). In *Conley v. Gibson*, 355 U.S. 41 (1957), this Court acknowledged that:

> the Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is 'a short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests.

355 U.S. at 47 (footnote omitted). *Conley*, however, was a suit by bargaining unit members against their union and did not involve any defense of immunity. *See generally* 355 U.S. at 42-48. As this Court has recognized, when an immunity is present the character of the litigation is substantially changed; the same notice pleading which ordinarily suffices is no longer adequate. *See, e.g.*, *Harlow*, 457 U.S. at 817-18 ("bare allegations of malice should not suffice to subject government officials either to the costs of trial or to the burdens of broad-reaching discovery"). As petitioners' complaint demonstrates,

every incident of police misconduct can form the basis of a *Harris* claim if all that is required is a conclusory allegation of the existence of a municipal custom or policy. To allow such suits to go forward on the basis of entirely conclusory allegations would eviscerate *Monell*; the heightened pleading rule thus protects against the loss of the immunity from suit municipalities enjoy for the torts of their employees.

Petitioners also argue that the heightened pleading rule violates the Rules Enabling Act, 28 U.S.C. § 2072(b), because it "abridges and modifies the substantive rights of civil rights litigants." Pet. Br. 27. According to petitioners, the heightened pleading rule "imposes a burden on civil rights plaintiffs that is impossible to meet" because "the evidence necessary to allege" this element with specificity "is in the exclusive hands of the governmental entity." Pet. Br. 23-24. In petitioners' view, the heightened pleading requirement thus impermissibly "add[s] requirements to burden the private litigant beyond what is specifically set forth by Congress." *Id.* (citation omitted).

This argument is without merit. Its core premise is that, under section 1983, petitioners have an unfettered right to sue local governmental entities. But as demonstrated above, Congress, in enacting section 1983, did not alter the immunity from suit which municipalities enjoyed at common law for the torts committed by their employees. The limitation on petitioners' right, therefore, is that which inheres in section 1983 itself rather than, as petitioners misleadingly suggest, something imposed by the heightened pleading standard.

Moreover, the Rules Enabling Act applies to the substantive rights of all litigants including municipal defendants; the notice pleading of Rule 8 cannot abridge a municipality's immunity from suit since it, too, is a substantive right. While it is not always clear whether a particular right is substantive or procedural, under any

definition an "immunity from suit" is a substantive right. An immunity directly affects the right of a plaintiff to recover; an immunity from suit goes even further in not only barring recovery but in barring judicial scrutiny. An immunity thus does not "concern[] merely the manner and the means by which a right to recover . . . is enforced," it "significantly affect[s] the result of a litigation" by denying the right to recover altogether. *Guaranty Trust Co. v. York*, 326 U.S. 99, 109 (1945).[15] The right to be free from the burdens of litigation as well as recovery clearly speaks to the substantive rights and duties of the parties and not the judicial process for enforcing any right. *See Hanna v. Plumer*, 380 U.S. 460, 464 (1965) (*quoting Sibbach v. Wilson*, 312 U.S. 1, 14 (1941)); *see also* Black's Law Dictionary 1429 (6th ed. 1990) (defining "substantive law" as "[t]hat part of the law which creates, defines, and regulates rights and duties of parties, as opposed to '. . . procedural . . . law,' which prescribes method of enforcing the rights or obtaining redress for their invasion"). When, as here, a defendant retains an "immunity from suit" that will be effectively lost if the defendant is subjected "either to the costs of trial or to the burdens of broad-reaching discovery," it is the notice pleading of Rule 8 which "abridge[s]" and "modif[ies]" a "substantive right"—that of local governmental entities to be immune from suit. The "heightened pleading" rule, far from imposing a requirement beyond what Congress has authorized, is a necessary mechanism for resolving the conflict between the competing purposes of section 1983—to provide a remedy when a municipality has itself been "the moving force [behind] the constitutional violation"

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[15] In this respect, an immunity differs little from a statute of limitations which, as this Court has held for purposes of the *Erie* doctrine, is a matter of substantive right which no federal procedural rule can abridge. *See Ragan v. Merchants Transfer & Warehouse Co., Inc.*, 337 U.S. 530, 533-34 (1949); *see also Guaranty Trust Co.*, 326 U.S. at 110-12.

without subjecting municipalities to suits solely because they employ a tortfeasor. *Monell*, 436 U.S. at 694.

The "heightened pleading" requirement is also consistent with Fed. R. Civ. P. 11's requirement that a pleading be filed only "after reasonable inquiry," that it be "well grounded in fact," and that it has not been "interposed for any improper purpose." To the extent the "heightened pleading" requirement forces a potential *Harris* plaintiff to develop a factual basis for his allegation of the existence of a municipal policy or custom prior to the filing of the complaint, it imposes no burden beyond that which Rule 11 already requires of all litigants.[16]

To be sure, there may be instances in which, because of the unavailability of pre-complaint discovery, application of the heightened pleading standard may impose a burden on a plaintiff's right to bring a section 1983 action. Petitioners, however, can make no such argument. The opinions of the Texas Attorney General demonstrate that the information necessary to establish the existence of a

[16] Petitioners suggest that Rule 11 sanctions "provide adequate protection to those . . . who might be subjected to 'frivolous' or 'vexatious' claims." *See* Pet. Br. at 26-27. This suggestion is unavailing because "in the case of pleadings the sanctions issue under Rule 11 normally will be determined at the end of the litigation." Fed. R. Civ. P. 11, Notes of Advisory Committee on Rules 1983 Amendment. Such a post-facto remedy cannot adequately redress the loss of the right to not be subjected "either to the costs of trial or . . . the burdens of broad-reaching discovery," *Harlow*, 457 U.S. at 817-18, because the loss of the right entails such significant costs as the distraction of governmental officials from their duties. Indeed, it is for this very reason that the denial of a claim of qualified immunity is immediately appealable under *Cohen*'s "collateral order" doctrine. *See Mitchell*, 472 U.S. at 525-30. The nature of the right is such that it cannot be vindicated after the fact. *See id.; cf. Abney*, 431 U.S. at 656-62 (denial of double jeopardy claim appealable under *Cohen* doctrine). Finally, as the Advisory Committee has noted, "[e]xperience shows that in practice Rule 11 has not been effective in deterring abuses." Notes of Advisory Committee on Rules 1983 Amendment.

municipal policy of inadequate police training is available under the Texas Open Records Act, Tex. Rev. Civ. Stat. Ann. art. 6252-17a (Vernon Supp. 1992). *See, e.g.*, Tex. Att'y Gen. Open Records Decision No. 350 (1982) (police internal affairs complaint, final determination and letter advising of disciplinary action available under Open Records Act); Tex. Att'y Gen. Open Records Decision No. 329 (1982) ("[T]he names of complainants who filed formal complaints with the police department's internal affairs division, the name of the officer who is the subject of the complaint, and the final disposition of the complaint by the city police department is public information and is required to be disclosed."),[17] In any event, petitioners have not shown that they made any effort to obtain records under the Open Records Act. Having failed to use the Open Records Act, petitioners cannot now argue in this Court that their substantive right to sue under section 1983 has been "impermissibly abridge[d]" by "an impossible burden."[18] Pet. Br. 24, 27.

[17] Petitioners' oblique suggestion that the "litigation exception" of the Texas Open Records Act, *see* Pet. Br. 19-20 (citing Tex. Rev. Civ. Stat. Ann. art. 6252-17a, § 3(a)(3)), bars pre-complaint discovery also appears to be erroneous. The Texas Attorney General has stated that § 3(a)(3) "does not protect basic facts, the release of which would not impair the governmental body's legal strategy." Tex. Att'y Gen. Open Records Decision No. 397 (1983). It is thus difficult to see how information relating to prior instances of police misconduct could be withheld from petitioners. Moreover, to the extent some information related to prior incidents of police misconduct might not be disclosable if the prior incident is the subject of litigation, the exception may not be invoked after the parties to that litigation have inspected the records in discovery. *Id.*

[18] There may be situations in which the heightened pleading requirement could impose a burden on a section 1983 plaintiff trying to establish the existence of a municipal policy or custom. Such instances may support the creation of a limited exception to allow discovery only on this narrow issue and only when such records cannot be obtained through state or local public records acts or efforts to obtain such records under such acts have been

Thus, as applied by the court of appeals in this case, the "heightened pleading" requirement imposed no burden on petitioners' substantive right to bring suit under section 1983 beyond that which section 1983 itself imposes. By requiring petitioners to show "a pattern of similar incidents in which citizens were injured," Pet. App. 12a-13a, the court of appeals did no more than require them to show that respondents were not entitled to the benefit of their immunity from suit for the torts of their employees. The "heightened pleading" standard thus ensures that every case of police misconduct will not result in a *Harris* suit against the municipality employing the officer. Invalidating the court of appeals' rule will, by contrast, lead to a torrent of *Harris* suits against municipalities merely because they employed police officers who may have committed constitutional torts. The federal courts, local governments, and our constitutional structure can ill afford such a result.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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frustrated. If, after this limited discovery, a plaintiff's amended complaint fails to allege sufficient facts to demonstrate the existence of a custom or policy, dismissal is appropriate.